STATE OF NEW YORK

3316

2019-2020 Regular Sessions

IN SENATE

February 5, 2019

Introduced by Sen. FUNKE -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and Correction

AN ACT to amend the correction law, in relation to notice to sex offenders of their determination hearing and the penalty for violations by sex offenders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 2 and 4 of section 168-d of the correction law, subdivision 2 as amended and subdivision 4 as added by chapter 684 of the laws of 2005, are amended to read as follows:

2. Any sex offender, who is released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge shall, prior to such release or discharge, be informed of his or her duty to register under this article by the court in which he or she was convicted. At the time sentence is imposed, such sex offender shall register with the division on a form prepared by the division. The court shall require the sex offender to read and sign such form and to complete the registration portion of such form. The court shall on such form obtain the address where the sex offender expects to reside upon his or her release, and the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such an institution, and shall report such information to the division. The court shall give one copy of the form to the sex offender and shall send two copies to the division which shall forward the information to the law enforcement agencies having jurisdiction. The court shall also notify the district attorney and the sex offender of the date of the determination proceeding to be held pursuant to subdivision three of this section, which shall be held at least forty-five days after such notice is given.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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[~~This~~] The notice to the sex offender shall include the following statement [~~or a substantially similar statement~~]: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. You have a right to a hearing before the court makes these determinations. You have a right to be represented by counsel at that hearing. Counsel will be provided if you are financially unable to retain counsel. Failure to appear at the hearing is a violation of this article. If you fail to appear at this proceeding, [~~without sufficient excuse,~~] it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." [~~The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel.~~] If the sex offender applies for assignment of counsel to represent him or her at the hearing and counsel was not previously assigned to represent the sex offender in the underlying criminal action, the court shall determine whether the offender is financially unable to retain counsel. If such a finding is made, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. Where the court orders a sex offender released on probation, such order must include a provision requiring that he or she comply with the requirements of this article. Where such sex offender violates such provision, probation may be immediately revoked in the manner provided by article four hundred ten of the criminal procedure law.

4. If a sex offender, having been given notice of the determination proceeding, including the time and place [~~of the determination proceeding~~] thereof in accordance with this section, fails to appear and be heard at [~~this~~] such proceeding, [~~without sufficient excuse,~~] the court shall conduct the hearing and make the determinations in the manner set forth in subdivision three of this section.

§ 2. Section 168-f of the correction law is amended by adding a new subdivision 1-a to read as follows:

1-a. Each sex offender shall appear at the determination proceeding, set forth in subdivision three of section one hundred sixty-eight-d of this article, subdivision two of section one hundred sixty-eight-k of this article or subdivision three of section one hundred sixty-eight-n of this article, held to determine the level of notification and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender.

§ 3. Paragraph (c) of subdivision 2 of section 168-f of the correction law, as amended by chapter 453 of the laws of 1999, is amended to read as follows:

(c) If the sex offender fails to mail the signed verification form to the division within ten calendar days after receipt of the form, he or she shall be in violation of this [~~section unless he proves that he or she has not changed his or her residence address~~] article.

§ 4. Subdivisions 2 and 4 of section 168-k of the correction law, subdivision 2 as amended and subdivision 4 as added by chapter 684 of the laws of 2005, are amended to read as follows:

2. The division shall advise the board that the sex offender has established residence in this state. The board shall determine whether the sex offender is required to register with the division. If it is determined that the sex offender is required to register, the division shall notify the sex offender of his or her duty to register under this article and shall require the sex offender to sign a form as may be required by the division acknowledging that the duty to register and the procedure for registration has been explained to the sex offender. The division shall obtain on such form the address where the sex offender expects to reside within the state and the sex offender shall retain one copy of the form and send two copies to the division which shall provide the information to the law enforcement agency having jurisdiction where the sex offender expects to reside within this state. No later than thirty days prior to the board making a recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review. After reviewing any information obtained, and applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, the board shall within sixty calendar days make a recommendation regarding the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. This recommendation shall be confidential and shall not be available for public inspection. It shall be submitted by the board to the county court or supreme court and to the district attorney in the county of residence of the sex offender and to the sex offender. It shall be the duty of the county court or supreme court in the county of residence of the sex offender, applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. At least thirty days prior to the determination proceeding, such court shall notify the district attorney and the sex offender, in writing, of the date of the determination proceeding and the court shall also provide the district attorney and sex offender with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board. [~~This~~] **The** notice **to the sex offender** shall include the following statement [~~or a substantially similar statement~~]: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. **You have a right to a hearing before the court makes these determinations. You have a right to be represented by counsel at that hearing. Counsel will be provided if you are financially unable to retain coun-**

sel. Failure to appear at the hearing is a violation of this article. If you fail to appear at this proceeding, [~~without sufficient excuse,~~] it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." [~~The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel.~~] A returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. It shall be the duty of the court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from the state board of examiners of sex offenders or any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations the court shall review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any material submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determinations. If available, facts proven at trial or elicited at the time of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. The court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may

appeal as a poor person pursuant to article eighteen-B of the county law.

4. If a sex offender, having been given notice **of the determination proceeding**, including the time and place [~~of the determination proceeding~~] **thereof** in accordance with this section, fails to appear **and be heard** at [~~this~~] **such** proceeding, [~~without sufficient excuse,~~] the court shall conduct the hearing and make the determinations in the manner set forth in subdivision two of this section.

§ 5. Subdivisions 3 and 6 of section 168-n of the correction law, subdivision 3 as amended and subdivision 6 as added by chapter 684 of the laws of 2005, are amended to read as follows:

3. No later than thirty days prior to the board's recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review. Upon receipt of the board's recommendation, the sentencing court shall determine whether the sex offender was previously found to be eligible for assigned counsel in the underlying case. Where such a finding was previously made, the court shall assign counsel to represent the offender, pursuant to article eighteen-B of the county law. At least twenty days prior to the determination proceeding, the sentencing court shall notify the district attorney, the sex offender and the sex offender's counsel, in writing, of the date of the determination proceeding and shall also provide the district attorney, the sex offender and the sex offender's counsel with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board. [~~This~~] **The** notice **to the sex offender** shall include the following statement [~~or a substantially similar statement~~]: "This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. **You have a right to a hearing before the court makes these determinations. You have a right to be represented by counsel at that hearing. Counsel will be provided if you are financially unable to retain counsel. Failure to appear at the hearing is a violation of this article.** If you fail to appear at this proceeding, [~~without sufficient excuse,~~] it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney." [~~The written notice to the sex offender shall also advise the offender that he or she has a right to a hearing prior to the court's determination, and that he or she has the right to be represented by counsel at the hearing.~~] If counsel has been assigned to represent the offender at the determination proceeding, the notice shall also provide the name, address and telephone number of the assigned counsel. Where counsel has not been assigned, [~~the notice shall advise the sex offender that counsel will be appointed if he or she is financially unable to retain counsel, and~~] a returnable form shall be enclosed in the court's notice to the sex offender on which the sex offender may apply for assignment of counsel. If the sex offender applies for assignment of counsel and the court finds that the offender is financially unable to retain counsel, the court shall assign counsel to represent the sex offender pursuant to

article eighteen-B of the county law. If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from the state board of examiners of sex offenders or any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations the court shall review any victim's statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the recommendation and any materials submitted by the board, and may consider reliable hearsay evidence submitted by either party, provided that it is relevant to the determinations. Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. The court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

6. If a sex offender, having been given notice **of the determination proceeding**, including the time and place [~~of the determination proceeding~~] **thereof** in accordance with this section, fails to appear **and be heard** at [~~this~~] **such** proceeding, [~~without sufficient excuse,~~] the court shall conduct the hearing and make the determinations in the manner set forth in subdivision three of this section.

§ 6. Section 168-t of the correction law, as amended by chapter 373 of the laws of 2007, is amended to read as follows:

§ 168-t. [~~Penalty~~] **Failure to register, appear at the determination proceeding, annually verify, personally verify, notify of status at an institution of higher education, notify of address change or change of status at an institution of higher education, notify of establishment of residence in state, or comply with the prohibition of employment on motor vehicles engaged in retail sale of frozen desserts; penalty**. **1.** Any sex offender required to register [~~or to verify~~] pursuant to the provisions of this article [~~who fails to register or verify in the manner and within the time periods provided for in this article shall be~~] **is** guilty of [~~a class E felony upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be~~

~~guilty of~~] failure to register, appear at the determination proceeding, annually verify, personally verify, notify of status at an institution of higher education, notify of address change or change of status at an institution of higher education, notify of establishment of residence in state, or comply with the prohibition of employment on motor vehicles engaged in the retail sale of frozen desserts when he or she:

(a) Fails to register with the division on a form prepared by the division (i) at least ten calendar days prior to discharge, parole, release to post-release supervision or release from any state or local correctional facility, hospital or institution where he or she was confined or committed, or (ii) at the time sentence is imposed for any sex offender released on probation or discharged upon payment of a fine, conditional discharge or unconditional discharge, or (iii) upon the division's request following a determination by the board that the offender is required to register pursuant to subdivision two of section one hundred sixty-eight-k of this article; or

(b) Fails to appear at the determination proceeding, set forth in subdivision three of section one hundred sixty-eight-d of this article, subdivision two of section one hundred sixty-eight-k of this article or subdivision three of section one hundred sixty-eight-n of this article, held to determine the level of notification and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender; or

(c) Fails to sign and return to the division the annual verification form mailed by the division to his or her last reported address pursuant to section one hundred sixty-eight-b of this article within ten calendar days after receipt of the form; or

(d) Fails to personally verify his or her address with the local law enforcement agency every ninety calendar days after the date of release or commencement of parole or post-release supervision, or probation, or release on payment of a fine, conditional discharge or unconditional discharge after having been given a level three designation or having been designated a sexual predator; or

(e) Fails to provide the division with the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed at, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such an institution; or

(f) Fails to notify the division no later than ten calendar days after any change of address; or

(g) Fails to notify the division no later than ten calendar days after any change of status at an institution of higher education; or

(h) Fails to notify the division within ten calendar days after establishing residence in this state in the case of a sex offender who has been convicted of an offense which requires registration under paragraph (d) of subdivision two of section one hundred sixty-eight-a of this article or paragraph (b) of subdivision three of section one hundred sixty-eight-a of this article; or

(i) Violates the provisions of section one hundred sixty-eight-v of this article.

2. Failure to register, appear at the determination proceeding, annually verify, personally verify, notify of status at an institution of higher education, notify of address change or change of status at an institution of higher education, notify of establishment of residence in state, or comply with the prohibition of employment on motor vehicles engaged in the retail sale of frozen desserts is a class D felony. [~~Any~~

~~sex offender who violates the provisions of section one hundred sixty-eight-v of this article shall be guilty of a class A misdemeanor upon conviction for the first offense, and upon conviction for a second or subsequent offense shall be guilty of a class D felony.~~]

3. Any such failure [~~to register or verify~~] may also be the basis for revocation of parole pursuant to section two hundred fifty-nine-i of the executive law or the basis for revocation of probation pursuant to article four hundred ten of the criminal procedure law.

§ 7. This act shall take effect immediately.